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S.W., Appellant)	
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and)	
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DEPARTMENT OF JUSTICE, FEDERAL)	Docket No. 20-1402
BUREAU OF PRISONS, COLEMAN FEDERAL)	Issued: March 28, 2022
CORRECTIONAL COMPLEX, Coleman, FL,)	
Employer)	
)	

Wayne Johnson, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
 JANICE B. ASKIN, Judge
 PATRICIA H. FITZGERALD, Alternate Judge
 VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 21, 2020 appellant, through counsel, filed a timely appeal from a January 23, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish exposure to tuberculosis (TB) in the performance of duty, as alleged.

FACTUAL HISTORY

On June 23, 2016 appellant, then a 50-year-old secretary, filed an occupational disease claim (Form CA-2) alleging that she was exposed to TB due to factors of her federal employment, including working around inmates in a closed environment within a federal prison. She noted that she first became aware of her condition and realized its relation to factors of her federal employment on April 21, 2016. Appellant stopped work on April 21, 2016.

In a June 23, 2016 statement, appellant stated that she initially believed that she had contracted the flu in March 2016 until she was diagnosed with TB on April 21, 2016. She indicated that she immediately notified her union representative and the employing establishment of her diagnosis, noting that it was work related as she was frequently around inmates and came in direct contact with them. Appellant explained that her office was in the unit with no windows or ventilation. She noted that inmates regularly came to her office to ask questions or to sign forms. Appellant further noted that she also regularly checked cells, patted down inmates, and performed all the duties of an officer. She indicated that she was previously diagnosed as a TB carrier in early childhood, which she disclosed to the employing establishment when she was first hired 15 years prior. Appellant asserted that she had no symptoms until March 2016.

In a July 21, 2016 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and provided a questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information regarding appellant's occupational disease claim, including comments from a knowledgeable supervisor regarding the accuracy of appellant's statements. It afforded both parties 30 days to respond.

A May 27, 2016 chest computerized tomography (CT) scan demonstrated minor spinal pleural thickening in the left of very limited degree with some reactive airway changes, as well as evidence of a limited hiatal hernia.

In an August 2, 2016 work capacity evaluation (Form OWCP-5c), Dr. Sara Vizcay, Board-certified in family practice, diagnosed TB and indicated that appellant could not work.

In an August 15, 2016 response to OWCP's development questionnaire, appellant asserted that she had been exposed to TB at work between 2001 and 2016. She indicated that, during her 10-hour work shifts, she had been exposed to infected inmates and that her coworkers who worked in the same work environment had also been exposed.

Dr. Vizcay, in an August 15, 2016 Form OWCP-5c, continued to hold appellant off from work and referred appellant to a pulmonologist.

By decision dated September 12, 2016, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish that her diagnosed condition was causally related to the accepted factors of her federal employment.

In a March 13, 2017 medical report, Dr. Vizcay noted that appellant developed flu-like symptoms in March 2016 and was subsequently diagnosed with TB on April 21, 2016. Appellant reported that she was frequently around inmates at work. Dr. Vizcay indicated that appellant could not climb up and down stairs without experiencing shortness of breath exacerbations. She also observed that appellant experienced difficulty sleeping and had chronic pain and depression secondary to her work injuries. Dr. Vizcay examined appellant and diagnosed exposure to TB, positive TB skin test without active disease, restrictive airway disease, and latent TB. She noted that appellant's CT scan showed minor apical pleural thickening on the left lung and some reactive airway peribronchial changes. Dr. Vizcay opined that appellant was exposed to TB at work because the etiology of this disease is associated with being in secluded places like prisons, homeless shelters, and/or any crowded condition like appellant's employing establishment. She concluded that appellant's statements regarding appellant's work injuries around April 21, 2016 were consistent with her medical findings.

In a June 6, 2017 medical report, Dr. Vizcay reiterated her findings and diagnoses, but additionally diagnosed depression and anxiety secondary to chronic pain. She noted that appellant's pulmonary function capacity test performed that day was in the 77th percentile. Dr. Vizcay opined to a reasonable medical certainty that appellant was exposed to TB at work.

On September 12, 2017 appellant, through counsel, requested reconsideration. Counsel argued that, although appellant acknowledged her latent TB, she came in contact with prisoners with TB at the employing establishment.

By decision dated November 2, 2018, OWCP affirmed, as modified, its September 12, 2016 decision, finding that appellant had not factually established that the employment exposure to TB had occurred, as alleged.

On November 2, 2019 appellant, through counsel, requested reconsideration.

By decision dated January 23, 2020, OWCP denied modification of the November 2, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,⁴ that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the

³ *Supra* note 2.

⁴ *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

employment injury.⁵ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.⁷

The employee's burden of proof includes the submission of a detailed description of the employment factors or conditions, which he or she believes caused or adversely affected a condition for which compensation is claimed.⁸

ANALYSIS

The Board finds that this case is not in posture for decision.

In her June 23, 2016 statement, appellant claimed that she was exposed to TB at work, as her work duties required her to be in direct contact with inmates in a federal prison and perform all officer duties, including patting down inmates and regularly checking cells. In her August 15, 2016 response to OWCP's development questionnaire, she further explained that she had been exposed to TB at work between 2001 and 2016 during her 10-hour work shifts when she had been exposed to infected inmates. Appellant indicated that her coworkers who worked in the same work environment had also been exposed.

In a July 21, 2016 development letter, OWCP requested that the employing establishment provide additional information regarding appellant's occupational disease claim, including comments from a knowledgeable supervisor regarding the accuracy of appellant's statements. The employing establishment, however, did not respond to the specific questions in its July 21, 2016 development letter.

The Board finds that it is unable to make an informed decision in this case as the employing establishment did not respond to the request for comment made by OWCP in the July 21, 2016 development letter.⁹

⁵ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *T.W.*, Docket No. 18-0788 (issued July 22, 2019); *J.C.*, Docket No. 16-1663 (issued January 18, 2017); *Lori A. Facey*, 55 ECAB 217 (2004).

⁹ *See S.S.*, Docket No. 19-1021 (issued April 21, 2021); *C.K.*, Docket No. 20-1493 (issued March 29, 2021).

It is well established that proceedings under FECA are not adversarial in nature and, while appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.¹⁰

This case will, accordingly, be remanded to OWCP for further development of the evidence regarding appellant's allegations of TB exposure at the employing establishment. OWCP shall request that the employing establishment provide a detailed statement and relevant evidence and/or argument regarding appellant's allegations. Following this and any other necessary development, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 28, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁰ See *M.A.*, Docket No. 20-1590 (issued May 12, 2021); *S.S., id.*; *D.O.*, Docket No. 20-0006 (issued September 9, 2020); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 204 (1985); *Michael Gallo*, 29 ECAB 159, 161 (1978).